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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 813

WILLIAM R. SKIDMORE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

OPINION IN CASE AT BAR AND IN RELATED CASE APPENDED.

WM. SCOTT STEWART,
Counsel for Petitioner.

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. .....

WILLIAM R. SKIDMORE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of William R. Skidmore, by Wm. Scott Stewart, his counsel, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Federal Grand Juries in and for the Northern District of Illinois investigated the gambling conditions in Chicago and Cook County, Illinois, ostensibly for the purpose of ascertaining whether or not the gamblers attempted to evade paying their full income taxes on the proceeds derived from gambling. Two trials were had resulting in convictions for most of the defendants, including your petitioner (R. 436). Two cases were appealed to the Circuit Court of Appeals for the Seventh Circuit. One resulted in a reversal, but that involving your petitioner was affirmed (R. 497). Your petitioner is on bail, the Circuit

Court of Appeals having granted a stay of mandate (R. 501).

The companion, or related case, which was reversed, is commonly referred to as the *Johnson* case (*United States* v. *Johnson,* 123 F.^{2} 111). We respectfully append the opinion in that case (herein p. 90) as well as in the case at bar (herein p. 78). In order to appreciate our respectful complaints it will be necessary that your Honors glance at the background of these cases, as shown by the record.

The honorable Circuit Court of Appeals said in the *Johnson* case (herein p. 104):

> "Johnson admittedly was a professional gambler and had been for many years. If he had any other business of consequence, the record does not disclose it. He was not just an ordinary gambler, but one of towering stature among that fraternity. The co-defendants were also admittedly in the same business. They operated brazenly and notoriously, and, so far as this record discloses, without interference or restraint during the period covered by the indictment. That the field was a fertile one is evidenced by the huge sums of money which apparently passed through their hands."

The Circuit Court of Appeals said of your petitioner that (herein p. 82):

> "he sold 'protection' to those who desired to engage in the 'handbook' business."

The honorable Circuit Court of Appeals does not explain how your petitioner could possibly have sold protection to anyone, nor can the record support any such assertion. Your petitioner held no official position. The prosecutor tried the case on the theory that your petitioner collected money from gamblers with which to bribe public officials (R. 370). We respectfully submit that the sig-

nificance of this distinction will become apparent upon examination of the record.

The Solicitor General has petitioned your Honors for certiorari in the *Johnson* cases (Nos. 799 and 800). We respectfully refer your Honors to the record in the *Johnson* cases in support of our contention that the honorable Circuit Court of Appeals has arrived at two opposite conclusions upon the same state of facts. If your Honors decide to allow the Government to be heard, we respectfully submit that your Honors will desire to take jurisdiction of the entire subject matter, which naturally includes the case at bar.

The indictment (No. 32125) in the case at bar was filed February 29, 1940 (R. 27). That in the *Johnson* case was filed May 29, 1940. In the *Johnson* case, as appears from the opinion appended, the honorable Circuit Court of Appeals held that the grand jury was without jurisdiction and that the trial court erred in striking the pleas in abatement. In the case at bar, the Circuit Court of Appeals held that the trial court committed no error in striking the same pleas.

We respectfully submit that we would have a right to make this respectful petition to your Honors in hope of success if there had never been a *Johnson* case, for we present errors which were not claimed in the *Johnson* case. As to those errors which were the same in both cases, we respectfully submit that your petitioner has the right to uniformity of decision, and that right having been denied him, your petitioner respectfully makes this application with the difference of opinion in the Circuit Court of Appeals as but one of his grounds. The honorable Circuit Court of Appeals held that the indictment was void as to Johnson because of the illegality of the grand jury, and then turned around and held upon the same record

that an indictment by the same grand jury was valid as to your petitioner.

In any discussion of the merits of the point, sight must not be lost of the fact that the trial court refused to look into the matter, and the Circuit Court of Appeals refused to remedy this neglect.

As appears from the record (R. 5), your petitioner was indicted (in No. 31770) in an indictment filed September 1, 1939 (July Term), which indictment recites that the Grand Jury is of the June 1939 Term:

> "and having continued to sit by order of this Court in and for said Division and District under the July Term of said Court for the purpose of finishing investigations begun but not finished during said June Term of Court, pursuant to request of the United States Attorney and upon motion of the Grand Jury, and inquiring for said Division and District at the July Term of said Court in the year 1939."

The order extending this Grand Jury by Judge Wilkerson appears in the record (R. 3). In the Northern District of Illinois the terms of Court are as follows (herein p. 91):

> "The Terms for the District Court of the Eastern Division of the Northern District of Illinois are fixed by Statute (28 U. S. C. A., Sec. 152), to be held on the first Mondays in February, March, April, May, June, July, September, October and November, and the third Monday in December."

A subsequent indictment (No. 32125) (R. 27) was returned and filed February 29, 1940, by the same grand jury held by the honorable Circuit Court of Appeals to have no legal existence as far as the *Johnson* indictment was concerned. Indictments No. 31770 and No. 32125 were consolidated and the guilty verdicts against your petitioner are based upon both of said indictments. Indictment No. 32125 recites that (R. 27):

> "The Grand Jurors for the United States of

America, duly empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Illinois at the December Term of said Court in the year 1939, having begun but not finished during said December Term of Court among other things an investigation of the matters charged in this indictment, and having continued to sit by order of this Court in and for said Division and District during the February Term of said Court for the purpose of finishing investigations begun but not finished during said December Term of Court, pursuant to request of the United States Attorney and upon motion of the Grand Jury, and inquiring for said Division and District at the February Term of said Court in the year 1940, upon their oaths do present and charge that:"

This allegation in the indictment is not fully in accordance with the facts, as the grand jury had secured a second order of extension (R. 26).

The orders entered by Judge Woodward, continuing the grand jury which returned indictment No. 32125, are shown in the record. (R. 25, 26).

Your petitioner on May 9, 1940, filed his special Plea (R. 32). These Pleas were stricken by the trial court on motion of the United States Attorney (R. 34). The Government offered no evidence at the trial that the grand juries were extended. The trial court overruled a motion for a directed verdict (R. 434, 435), as well as a motion in arrest of judgment (R. 437). Your petitioner respectfully represents that these errors were fatal to the judgment.

The honorable Circuit Court of Appeals disposed of the matter in the case at bar (herein p. 79) as follows:

"The District Attorney moved to strike each plea in abatement, or motion to quash, for the reasons that neither contained sufficient allegations of fact to support the motions, but on the other hand each contained mere conclusions of appellant with no supporting allegations of fact, and was merely an attempt to

contradict the record in each case, and for the further reason that each plea failed to state the source of information upon which appellant's assertions were founded. The court sustained these motions and struck the pleas."

The opinion in the *Johnson* case (herein p. 94) shows the following:

> "The Government had an opportunity to answer the allegations of the motion to quash, but instead, entered a motion to strike, which was allowed. By such motion a legal question was presented which must be determined from the averments of the motion to quash.
>
> * * * * *
>
> "We are not unmindful of the rule invoked by the Government that pleas in abatement and those of a kindred nature must be strictly construed. Facts must be stated, not conclusions. Here, however, the allegations were direct and positive. It is difficult to see how they could have been more specific. The challenge went to the very heart of the authority of the Grand Jury to act. The Government's motion to strike should have been overruled and the Government required to answer. The defendants were entitled to an opportunity to offer evidence in support of the motion and plea. *Carter* v. *Texas*, 177 U. S. 442, 447."

In the *Johnson* case the Circuit Court of Appeals (herein p. 100) held that failure to prove the allegation in the indictment (that the grand jury was extended) was fatal to the conviction. There was a like failure in the case at bar. A decision one way in one case and an opposite holding in a companion case (without any attempt at explanation) must, we respectfully submit, be regarded here as untenable.

In the *Johnson* case the Circuit Court of Appeals said (herein p. 100):

> "If the allegation was essential, as we think it was, it would seem equally essential to support it with proof. Failure to have proved venue, no doubt, would

have been fatal to the judgment. We think failure to prove the allegation with reference to the authority of the Grand Jury to act is likewise fatal. This is especially true in the instant case where the Government relied upon it in order to escape facing the issue tendered by the motion to quash.

"The position of the Government leads to the inevitable result that a Grand Jury may, with impunity, exceed the limitation which Congress has definitely and plainly placed upon its authority, to act at a succeeding term. Furthermore, its unauthorized acts are not subject to challenge and the Government can never be called upon to make proof that the Grand Jury has proceeded in compliance with law. When confronted with a motion to quash or plea in abatement, it relies upon an allegation of the indictment. When the latter is placed in issue by the defendant's plea, it offers no proof in support of the allegation, and the only excuse for its failure to do so is that the court takes judicial notice. There may be room for contrariety of opinion as to the precise manner in which the authority of a Grand Jury should be challenged, but we doubt if any will contend that the Government can wholly evade the challenge as has been done in the instant case. Failure of proof with reference to the allegation under discussion is, in our opinion, fatal to the judgment."

In the case at bar, the Circuit Court of Appeals did not discuss this point but merely made the general finding that there was no error in striking the pleas, in overruling the motion to quash and in the judgment. The honorable Circuit Court of Appeals said further in the *Johnson* case (herein p. 98):

"Finally the Government relies upon Section 556, Title 18, U. S. C. A., which provides in substance that no indictment, trial, judgment or other proceeding shall '* * * be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.' This provision is not applicable—the question presented is one of substance and not of form. *Crain* v. *United States,* 162 U. S. 625, 644."

In the case at bar the first indictment (No. 31770, R. 5) was returned by the June, 1939, grand jury on September 1, 1939. If the reasoning and law announced in the *Johnson* case be applied to the case at bar, this grand jury was without jurisdiction, as the order of extension (R. 3) authorized the grand jury to sit through July.

Your Honors will perceive from the record (R. 45) that your petitioner alleged in his plea, which plea was stricken (R. 47), that the December, 1939, grand jury had no legal existence because the investigation was not commenced during the regular December, 1939, term. This was a positive sworn statement (R. 45). We shall respectfully follow the method adopted by Mr. Justice Evans (herein p. 115) to better explain the situation. We respectfully add the case at bar to the outline sketched by Mr. Justice Evans in his dissent in the *Johnson* case.

> December, 1939. The grand jury was impaneled. (This is the grand jury which returned the Johnson indictment and also returned the Skidmore indictment (No. 32125).)
>
> January 24, 1940. The first order extending the term of the grand jury. (This is a valid order according to the Circuit Court of Appeals.)
>
> February 28, 1940. The second order extending the term of the grand jury. (This order is void and the grand jury became illegal according to the majority opinion of the Circuit Court of Appeals.)
>
> February 29, 1940. The indictment in the case at bar (No. 32125) was returned.
>
> March 1, 1940. The indictment No. 32127 against Johnson was returned (February Term). (Not convicted on this.)
>
> March 29, 1940. The instant indictment against Johnson returned during March Term. (Held void in the majority opinion in the *Johnson* case.)

Now your Honors will perceive that the difference between the first order of extension (R. 25) and the second

order of extension (R. 26) is that the latter (as held by the majority opinion) attempted to give the jury power to return indictments in which investigation had begun in the February Term. If the grand jury did not in fact start the investigation of your petitioner in the February, 1940, term as alleged in the plea, we respectfully submit that said grand jury would not have applied for the second order before returning the indictment in the case at bar. We respectfully submit that if the investigation had in fact been commenced in December, 1939, the grand jury would have returned the indictment in the case at bar before making application for a new order of extension. As Mr. Justice Evans said (herein p. 115):

> "The first order of extension, made January 24, 1940, authorized the grand jury to sit during the February, 1940 term of court to *finish* investigations begun but not finished at the December, 1939 Term. *We should presume they did what they were ordered to do.*"

We respectfully submit that at least your petitioner was entitled to have the matter inquired into, as was held in the *Johnson* case. Your Honors will please note that Mr. Justice Evans said (herein p. 113):

> "This assignment raises a most important question."

But we respectfully submit that we should not be compelled to try to guess from the record when the investigation commenced against your petitioner. Disregarding the *Johnson* case entirely, the plain fact, as shown by the record, is that your petitioner represented under oath, in a proper manner, in apt time, that in fact the investigation was not commenced in time to give the grand jury jurisdiction. All your petitioner requested was a hearing, which hearing was denied him for no reason except that the prosecutor desired to avoid a hearing upon the merits. The honorable Circuit Court of Appeals has refused to correct this plain error.

In the case at bar we presented to the trial court a fatal defect in the organization of the grand jury, which was not claimed in the *Johnson* case, namely, that the grand juries were hand picked and packed against your petitioner. This same charge was made as to the trial panel.

Your petitioner was not afforded a preliminary hearing. When the various grand juries were empaneled your petitioner was not in custody or on bail, so your petitioner was not obliged to attack the manner of organizing the grand jury until after the indictments were filed. Upon the opening of the *Johnson* trial, your petitioner was dismissed from that case as a defendant (R. 55).

Your petitioner, by leave of the trial court, moved to quash the indictments in the case at bar and challenged the array of the trial panel for reasons fully set up by way of affidavits (R. 52 to 94).

Your petitioner respectfully represented to the trial court that all grand juries and petit juries in the Federal Courts in Chicago, including those on this case, were improperly and illegally drawn and impanelled. Those persons residing outside of the City of Chicago were favored and selected in preference to those living in Chicago. Those who follow the trades, and ordinary working people and their women folk were discriminated against, and an effort was deliberately made by those in charge to obtain as jurors persons calculated to favor the prosecution. Those in charge unlawfully, intentionally and systematically excluded qualified voters from among persons summoned and listed for jury service on both grand and petit juries solely because those excluded might, by reason of their place of residence, occupation and station in life, be open and fair minded concerning the rights of defendants, and those in charge unlawfully discriminated in favor of prospective jurors who might favor the cause of the prosecution. Such discrimination was known by those in charge to be illegal,

and therefore any inquiries made by your petitioner, or by those working in his behalf, were refused answer on the ground that much of the proceeding was not open to the public. The jurors were not drawn by lot or by chance.

Your petitioner further respectfully represented to the trial court that the irregularities as to the selection of juries, upon their face, are not only such that prejudice should be presumed, but your petitioner feared actual prejudice for the following reasons, among others.

The subject of gambling had been made a political football for years in Chicago. The newspapers had sought to discredit those in favor and in power from time to time with stories about gambling. A feud existed between the city authorities and the State's Attorney, resulting in ax raids. In order to discredit the administration, your petitioner had been named as one who collects and pays bribes. Your petitioner alleged that these charges were repeated deliberately on the eve of this trial in order to prejudice your petitioner in his right to a fair jury. Your petitioner represented to the trial court that persons drawn from Chicago in the ordinary walks of life were more apt to understand the methods employed by the newspapers, were more apt to know that many false charges were so made for political purposes than were those people living in remote parts of the district.

Your petitioner informed the trial court that the prosecution expected to rely largely upon circumstantial evidence, and that the question as to whether the city administration was corrupt or whether gambling was illegally permitted was not an issue in the case; that such questions might arise collaterally; that your petitioner feared that cautionary instructions would not be sufficient to insure a fair trial unless precaution was taken to secure a jury properly chosen according to the law of the land.

Your petitioner represented further that if any jurymen

were prejudiced by newspapers, as those illegally drawn from remote areas and from a class of persons holding animosity to your petitioner were likely to be, your petitioner could not secure a fair trial. And if the entire panel were loaded down with such persons, your petitioner would not be protected by challenges, either cause or peremptory.

Your petitioner respectfully requested that the honorable trial court hear witnesses on the manner in which the various juries had been selected, the nature of the newspaper articles and all of the circumstances surrounding the panel of jurors then awaiting service on the trial panel.

In order to show the trial court from the records that this illegal practice had become a common practice, your petitioner showed, by affidavit, the population of Chicago and the County of Cook, as compared with the outlying district. Roughly, the big city and its county have 86% of the population (R. 59) but the outlying territory furnishes 86% of the jurors, grand and petit. Among the records examined was that of the *Glasser* case (R. 70). (In which this Honorable Court allowed a petition for certiorari. No. 798, October Term, 1940.)

Your petitioner, through his counsel (R. 80), informed the trial court that your petitioner had been denied a jury list and access to the papers of those in charge, including questionnaires on file. We respectfully quote from the record (R. 81):

> "Mr. Stewart: All we are asking the Court to do is to ascertain the facts, and if the facts are that these jurors are selected in such a manner that it is not by lot, why, that can be a grave danger to the liberty of any defendant, and it can also work out the other way.
>
> "If a jury commissioner or a marshal or a sheriff is permitted to go out and just pick jurors that he thinks he wants in that particular case, why, they can control the result.
>
> "So the motion here now is that your Honor follow

up this charge that is made by examining into the question of the composition of this panel and the manner in which it is selected."

The trial court informed the United States attorney that the court did not care to hear anything upon the matter of grand juries but that (R. 82):

"The Court: I would like to hear from you concerning this (the trial) jury."

The trial court certified to the Circuit Court of Appeals all that was said upon the subject (R. 80 to 94), and we respectfully submit that your Honors will perceive from the record that the Government attorneys demurred to the charges made by your petitioner and prevented a hearing upon the matter. We quote (R. 88):

"Mr. Stewart: I take it that your Honor is following the recommendation of the Government and refusing to go into the matter?

"The Court: That is right. I don't think it is my duty.

"Mr. Stewart: I take exception to the action of the Court and exception to the ruling."

Your petitioner respectfully submits that the honorable Circuit Court of Appeals entirely misconceived the record when it held that (herein p. 81):

"There is not one scintilla of evidence in this case to support the charge that the grand jury or the petit jury was illegally or unfairly drawn, or that the inquiry was illegally or unfairly conducted, or that appellant was thereby harmed."

Your Honors will see from the record that, although requested, no opportunity was afforded petitioner to introduce evidence. As was said in *Carter* v. *Texas*, 177 U. S. 442, 449, the assumption by the Circuit Court of Appeals that no evidence was tendered by your petitioner is

"plainly disproved by the statements, in the bill of exceptions, of what took place in the trial court."

The Circuit Court of Appeals held that your petitioner's main contention in this respect was that (herein p. 81):

> "in proportion to population, there were fewer jurors drawn from the city of Chicago and its environs than from any other parts of the federal judicial district in which the case arose. It was stated in effect that it was manifestly unfair for the citizens of Chicago to be compelled to submit to trial before a jury predominated by citizens living outside the city, whose manner of living and moral concepts might be very different from those living within the city limits. Such suggestion does not merit serious consideration."

Your Honors will perceive that this was not in fact our main contention. Petitioner would have been glad to have a fair jury from any part of the district. The fact that jurors were so frequently drawn from the country demonstrated that they were not chosen at random, by lot. Our main contention was that the jury was hand-picked and packed against petitioner. The trial court declined to look into the matter and the honorable Circuit Court of Appeals evaded the issue. Our respectful application is that your Honors examine into the question upon our claim that petitioner has been deprived of his constitutional rights (VI Amendment, herein p. 75).

Your petitioner exhausted his peremptory challenges and challenged the jurors for cause, to no avail (R. 94), and then sought to waive the jury (R. 89).

As we have said, the attack made upon the indictments in the trial court was first by way of plea in abatement (R. 41, 45). These pleas were stricken (R. 43). Your Honors will see from the record (R. 42, 46) that your petitioner complained to the trial court that rights guaranteed to your petitioner under the fifth and fourteenth amendments to the constitution of the United States of America had been denied your petitioner. The indictments were again attacked by motion to quash (R. 53), and your petitioner claimed that rights guaranteed under the sixth

amendment to the United States constitution were denied to your petitioner. Your Honors will also see from the record (R. 434, 435) that your petitioner renewed the objections made by your petitioner as to the grand juries and the petit jury when your petitioner moved for a directed verdict. The same objections were again presented upon motions for new trial and in arrest of judgment (R. 437). In the notice of appeal your petitioner included among his grounds the points here urged (R. 440). Your Honors will find these points in the assignment of errors (R. 443). The honorable Circuit Court of Appeals said (herein p. 81) as to your petitioner:

> "We think there is no merit in these contentions."

So we respectfully submit that the points urged here have been properly preserved in the record and are such that this honorable court should take jurisdiction by certiorari.

In both the *Johnson* case and the case at bar, Mr. Hurley (assistant United States Attorney) submitted his case to an expert witness, Clifford, calling upon him to weigh the evidence and decide the issues. The Circuit Court of Appeals held that there was no error as against your petitioner, while at the same time holding that the error in this regard alone was sufficient to reverse the *Johnson* case.

In the case at bar, the honorable Circuit Court of Appeals said (herein, p. 86):

> "Such questions were quite proper and the province of the jury was not thereby invaded. There was no error in permitting the questions to be answered."

The honorable Circuit Court of Appeals said of Clifford in the *Johnson* case that (herein, p. 111):

> "It plainly discloses, however, that he decided in favor of the Government all the controverted issues upon which his answers were predicated."

Clifford did the very same thing in the case at bar (R.

235, 237), as we believe your honors will perceive from the record. The honorable Circuit Court of Appeals said in the *Johnson* case (herein, p. 111):

> "The mere recitation of the questions propounded and answers given by this witness demonstrates their gross impropriety."

The issues in the case at bar would have been very simple if the Government attorneys had been content to try an income tax case and to submit the contested questions of fact to the jury. But no, the Government attorneys insisted on trying local gambling conditions, appealed to the prejudice and passion of the jury and usurped the province of the jury by having their expert, Clifford, weigh the evidence and decide the very serious issues involved.

In the *Johnson* case, where Clifford gave testimony which, we respectfully represent, was identical with that given in the case at bar, the honorable Circuit Court of Appeals said (herein, p. 112):

> "We are of the view that the testimony of this witness, going to the very heart of the controverted issue and invading the province of the jury as it did, was so prejudicial and damaging that it alone would require a reversal of the judgment."

Your Honors will perceive from the record that if the Government ever had a case, which we respectfully dispute, their case was based entirely upon circumstantial evidence. The trial court gave the usual stock instruction defining circumstantial evidence and concluding that such evidence was legal (R. 414). Your petitioner offered a correct instruction (R. 418) to the effect that the circumstances must exclude any reasonable hypothesis of innocence, which instruction was refused. The honorable Circuit Court of Appeals held that (herein, p. 88):

> "We think the court fully and accurately instructed the jury upon the subjects of direct and circumstantial evidence and that its instructions substantially

covered that requested by appellant. Moreover, all of the evidence in this case was not by any means circumstantial, and we think the court did not err in this respect."

Your Honors have the record and will perceive that the honorable Circuit Court of Appeals is mistaken. This is a circumstantial evidence case. Of course, your Honors know that a defendant is entitled to instructions embracing his theory or any theory of defense reasonably based upon the evidence.

Your petitioner filed no returns and paid no taxes prior to 1929. The Government agents examined your petitioner's books and inquired as to why your petitioner had not filed income tax returns. Your petitioner stated to them, as testified to by them (R. 155), and as testified to by your petitioner (R. 276) without contradiction, that your petitioner did not file income tax returns because your petitioner had been advised by certain federal agents, named by your petitioner, that there was some question in the Department as to whether your petitioner should file and pay on gambling proceeds. Your petitioner for this reason had not filed. The Government agents arrived at a settlement and your petitioner paid $9200. The record abundantly shows that your petitioner has had money and has enjoyed a lucrative income since long before the income tax law was enacted. Your petitioner claimed, in his statement to the Government agents (R. 142) and as a witness in his own behalf (R. 275), that the money spent by your petitioner in excess of that reported as income was from previous earnings and savings. We respectfully submit that in view of this uncontradicted evidence there was no occasion for any instruction on presumption. Yet the trial court instructed the jury that (R. 417):

"Evidence that he did not file a tax return for any of these prior years may therefore be considered by you as an admission by him that he did not have a net income in excess of the amounts for which he would have been required by law to have filed a tax return."

The Circuit Court of Appeals held (herein p. 88) that this erroneous instruction could have done petitioner no harm because petitioner was acquitted for the first three years in the indictment. We respectfully submit that the Circuit Court of Appeals overlooked the fact that the only contested issue was whether your petitioner spent money which he had saved, or expended money from income. There was no room for any presumption upon the subject.

Despite our repeated objections in the trial court, we respectfully submit that there was absolutely no limitation placed upon the prosecutor in his cross-examination of your petitioner (R. 296, 304, 311, 293). In answer to our complaints in this respect, the Circuit Court of Appeals announced a few sound general rules (herein p. 87) but did not set out the errors complained of. We respectfully submit that the honorable Circuit Court of Appeals misapprehended the record, for the cross-examination permitted by the trial court actually deprived your petitioner of a trial in accordance with the laws of the land.

In a short studied speech to the jury, delivered in closing after his assistants had summed up, the United States Attorney told the jury that in his opinion your petitioner was guilty (R. 411). We quote:

> "Mr. Woll (United States Attorney): I represent the Government, and as long as I represent the Government, there never will come a time when I have to hold my head in shame and tell you one thing that I never believed in myself. **I believe in this case; I know this man is guilty** from that evidence on the witness stand. **I say** this evidence has proved him guilty."

The honorable Circuit Court of Appeals dismissed our respectful complaint by holding that (herein p. 87):

> "We have read the arguments of counsel, and we are convinced that they are not fairly subject to this criticism.
>
> * * * * *
>
> "It is only fair to say that neither appellant nor

his counsel raised any objection to the argument until long after the verdict was returned, when it was too late to reserve an exception."

The record, we respectfully submit (R. 411), shows an objection, and the trial court had previously announced that no formal exceptions would be required.

The jury retired on Friday, March 8, 1941, at 1:38 P. M. (R. 430), and at 10:35 A. M., Saturday, March 9, 1941, the jury sent a note to the judge to the effect that they were agreed on one indictment and deadlocked on the other. The trial judge brought the jury into court at 11:35 A. M. and ascertained that they had a verdict as to one indictment and were unable to agree on the other indictment (R. 426). The court ordered the one verdict received, but the defendant demanded a poll which was completed, not without difficulty. Mrs. Pohlman, the only juror from Chicago, hesitated and showed emotion by tears (R. 428). The verdict was recorded, and after the foreman reported that he did not think further deliberations would bring about an agreement, the jury was returned for further deliberations, over the objection of the defendant (R. 426). The jury was returned to the court again at 12:20 P. M., at which time the foreman said that some progress was being made (R. 428). The jury was returned to the jury room and at 2:53 brought in a second verdict, over the objection of the defendant, finding the defendant guilty as to 1937 and 1938, and not guilty as to 1933 to 1936, inclusive (R. 430).

We respectfully submit that piecemeal verdicts can not be sustained and that the honorable Circuit Court of Appeals misapprehended the record in regarding the indictments separately when in fact they had been consolidated. It is our respectful contention that the first verdict was based upon a void indictment; that it was not a complete determination of the case and was void. By recording the first verdict the jury exhausted its powers, therefore the second verdict was void.

In view of the admonition of your Honors that this petition must be prepared with studied accuracy, brevity and clearness, and the holding that this Honorable Court will not consider questions not raised by this petition, we respectfully list a summary of the errors committed by the trial court, upon which we respectfully submit that the honorable Circuit Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions; has decided important questions of general law in a way probably untenable and in conflict with the weight of authority; has decided important questions of federal law which should be settled by this Honorable Court; has decided federal questions in a way probably in conflict with applicable decisions of this Honorable Court; has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for this court's power of supervision.

It is our respectful contention that the errors committed in the trial court, and not corrected by the Circuit Court of Appeals, resulted in depriving your petitioner of a fair and impartial trial in accordance with the law of the land.

We would not burden your Honors now with what may seem to be minor errors over which the local courts ordinarily have final jurisdiction, but since we understand that the errors not claimed in this petition can not be urged upon the hearing, and since we expect to make the respectful claim that the trial below was one in form only, a mockery in which your petitioner was swept to a pre-determined conviction, we respectfully specify the errors to be urged in the event that this Honorable Court issues the writ.

B.

Specification of Errors to Be Urged.

It is respectfully submitted that the judgment should be reversed for the following reasons:

There is no evidence to support any of the guilty verdicts.

The trial court erred in refusing to instruct the jury as to the correct rule relative to circumstantial evidence.

The court erred in permitting the expert for the Government to decide questions at issue for the jury.

The court erred in permitting the prosecutors to assume facts improperly in the direct examination of Clifford.

The court erred in permitting improper direct examination and in unduly limiting the cross-examination of the expert witnesses for the Government.

The court erred in admitting the testimony of Edwin J. Raber and unduly limited your petitioner in his cross-examination of this witness.

The court erred in permitting improper cross-examination of your petitioner.

The prosecutors appealed to prejudice and placed your petitioner on trial for offenses not contained in the indictment and over which the federal court has no jurisdiction. The court erred in permitting such misconduct.

The prosecutors improperly prejudiced the rights of your petitioner by stating their personal belief as to the guilt of the defendant and by appealing to prejudice and passion.

The court erred in instructing the jury that evidence that your petitioner did not file returns for prior years might be considered as an admission that your petitioner did not have income sufficient to require a return.

Instructions were erroneous and misleading for the reason that the charge was not limited to that alleged in the indictment.

The court erred in refusing instructions offered by your petitioner calculated to confine the issues to the allegations made in the indictment.

The court erred in instructing the jury that their verdict was not to be determined by the exhibits in evidence.

The indictment is fatally defective.

A variance exists between the indictment and the proof.

The court erred in refusing a bill of particulars.

The indictment is duplicitous and the court erred in not sustaining a motion to quash.

The court erred in overruling the challenge to the array entered as against the grand juries and the trial jury.

The procedure adopted as to the verdicts was erroneous and such that neither verdict can properly stand.

The trial court erred in not quashing the indictment, in refusing to direct a verdict for petitioner and in overruling the motion in arrest of judgment for the reason that the grand jury was without power to act, illegally drawn and illegal.

The trial court erred in refusing to direct a verdict for the petitioner because of the failure of the Government to offer proof of the legal existence of the grand jury.

The Circuit Court of Appeals erred in affirming the judgment of the trial court.

This Honorable Court will be respectfully urged to enter such judgment or order as the nature of this proceeding and justice requires.

C.

Basis of the Court's Jurisdiction.

This Honorable Court may by certiorari have this cause certified to it for determination under the act of February 13, 1925, 43 Stat. 938, Ch. 229, Sec. 1, 28 U. S. C. A., amend-

ing and reenacting Sec. 240 (a) of the Judicial Code. The decision in the Circuit Court of Appeals was rendered October 31, 1941 (R. 497). The petition for rehearing, filed within the time allowed, was denied on December 4, 1941.—(R. 498).

D.

Questions Presented.

Whether the honorable Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such departure by the District Court as to call for an exercise of this Honorable Court's power of supervision. The most serious charges might be summarized as follows:

Can Government attorneys, and others, charged with the selection of grand and petit juries, adopt a system calculated to secure partisan jurors who favor the cause of the Government,, and such attorneys be permitted to block an inquiry into the manner in which the juries are chosen, and after the prosecutors have blocked a hearing in the trial court, can the Circuit Court of Appeals be permitted to evade the real issues by holding that petitioner did not prove his charges?

Can a conviction, based upon an indictment challenged as void, and so held by the Circuit Court of Appeals in a companion case, be permitted to stand?

Do the errors committed in the trial court and sanctioned by the Circuit Court of Appeals combine in depriving your petitioner of the right to a fair trial as guaranteed by the Constitution and laws of the United States?

E.

AUTHORITIES.

I.

This Honorable Court has indicated in its rules that a petition for certiorari is properly supported by a showing that a Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this court."

Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, Sec. 314, p. 638, citing *United States* v. *Macintosh*, 283 U. S. 605, Rule 38, par. 5(b).

II.

Some of the decisions of this Honorable Court respectfully submitted to be applicable and disregarded by the Circuit Court of Appeals follow:

Carter v. *Texas*, 177 U. S. 442, 447.
Smith v. *Texas*, 311 U. S. 128.
Pierre v. *Louisiana*, 306 U. S. 354.
Neal v. *Delaware*, 103 U. S. 370.
Virginia v. *Rives*, 100 U. S. 313.
Berger v. *United States*, 295 U. S. 78.

III.

We respectfully submit that this Honorable Court should issue the writ of certiorari because the decision of the Circuit Court of Appeals is wrong.

Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, sec. 304, p. 610, citing *Reynolds* v. *United States*, 292 U. S. 443; *Southern Railway Co.* v. *Walters*, 284 U. S. 190; *Payne* v. *United States*, 296 U. S. 659. (Dismissed by stipulation.)

IV.

We respectfully submit that the two decisions (Johnson and Skidmore) in the Circuit Court of Appeals could not be right.

Stringfellow v. *Atlantic Coast Line R. Co.*, 290 U. S. 322; *Compagnie Generale* v. *Elting*, 298 U. S. 217.

V.

The use of certiorari to correct error is proper in criminal cases.

Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, sec. 304, p. 616, citing *Alford* v. *United States*, 282 U. S. 687; *Husty* v. *United States*, 282 U. S. 694; *Escoe* v. *Zerbst*, 295 U. S. 490; *Shepard* v. *United States*, 290 U. S. 96; *Payne* v. *United States*, 296 U. S. 659.

VI.

This Honorable Court, having granted an application for certiorari in Glasser v. United States (No. 798), which presents questions closely related to matters presented in the case at bar relative to jury selection, should allow this application.

Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, sec. 309, p. 628, citing *Mitchell* v. *Maurer*, 293 U. S. 237; *General Motors Acceptance Corporation* v. *United States*, 286 U. S. 49; *General Import and Export Co.* v. *United States*, 286 U. S. 70; *United States* v. *Commercial Credit Co.*, 286 U. S. 63; *United States* v. *Corriveau*, 286 U. S. 530; *Gordon* v. *Washington*, 295 U. S. 30.

VII.

The Government has petitioned this Honorable Court in the Johnson case for a writ of certiorari (Docket Nos. 800, 801) and it is respectfully submitted that your Honors should take jurisdiction of the entire matter.

VIII.

Please see brief appended hereto.

F.

Reasons for Granting the Writ.

1. The honorable Circuit Court of Appeals has sanctioned a departure, by a lower court, from the accepted and usual course of judicial proceeding. Your petitioner has been denied a fair and impartial jury.

2. It is necessary for this Honorable Court to correct the prevailing method of selecting grand and petit juries in our district. At present jurors are hand-picked from the country districts, calculated to favor the cause of the Government, and the local courts refuse to permit a defendant to expose the manner in which jurors are picked.

3. This Honorable Court, in the pending case of *Daniel D. Glasser* v. *United States of America* (No. 798), granted a writ of certiorari. The charge was made in the *Glasser* case that juries are packed in the trial court, from which the case at bar originates. The honorable Circuit Court of Appeals has refused relief in the *Glasser* case and has also neglected to interfere in the case at bar. The illegal practice is vicious and of long standing, as shown by the records, and calls for correction by this Honorable Court.

4. The Circuit Court of Appeals has decided many important questions of general law in a way untenable and in conflict with the weight of authority.

5. The Circuit Court of Appeals, in a companion case (the *Johnson* case), decided that an indictment returned by the same grand jury involved in one of the cases herewith was void, and the Circuit Court of Appeals decided in said companion case that identical errors shown by this record constituted reversible error. In the *Johnson* case the Circuit Court of Appeals held that the Government attorneys should not be permitted to evade the real issue by moving to strike the pleas in abatement, while in the

case at bar the same Circuit Court of Appeals held that the same pleas were properly stricken by the trial court.

6. The Government has petitioned this honorable Court for a writ of certiorari in the *Johnson* case, a companion case (Docket Nos. 799 and 800), and it is respectfully submitted that your Honors should take jurisdiction of the entire matter.

7. Your petitioner has been denied that fair and impartial trial guaranteed by the Constitution and laws of the United States, as appears more fully from our brief and argument annexed.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM R. SKIDMORE,
Petitioner,

by WM. SCOTT STEWART,
Counsel for Petitioner.

December 22, 1941.